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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| VANESSA E. BELL et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>SAMUEL PIERCE et al.,<br><br>Defendants and Appellants. | B196230 c/w B198961<br><br>(Los Angeles County<br>Super. Ct. No. BC332515<br>c/w No. SB05Z00925) |

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Judgment affirmed as modified. Order vacated in part and affirmed in part.

Greines, Martin, Stein & Richland, Marc J. Poster and Peter O. Israel for Defendant and Appellant Samuel Pierce.

Stanley D. Bowman for Defendant and Appellant Western Properties 2005 Irrevocable Trust.

Bannan, Frank & Terzian, Richard R. Terzian and Brian I. Hamblet for Plaintiffs and Respondents.

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## INTRODUCTION

Defendants Sam Pierce (Pierce) and Western Properties 2005 Revocable Trust (Western Properties Trust) appeal from the judgment and the post-trial attorney's fees order in the lawsuit against them and other defendants filed by plaintiffs Vanessa E. Bell and Michael J. Bell (the Bells) for specific performance of a contract to purchase real property and the consolidated unlawful detainer action brought by Pierce against the Bells.

Pierce contends the trial court erred in ruling in favor of the Bells on their specific performance cause of action, in that there was no enforceable real estate purchase contract, that the trial court erred in ruling that the Bells prevailed on the unlawful detainer cause of action, and it erred in awarding the Bells attorney's fees.

Western Properties Trust contends the trial court erred in finding the foreclosure sale fraudulent and therefore void and in finding it liable for the Bells' attorney's fees as Pierce's alter ego.

We modify the judgment and affirm it as modified. We vacate the attorney's fees order as to Western Properties Trust and affirm it in all other respects.

## FACTUAL AND PROCEDURAL BACKGROUND

The Bells and Pierce had been friends since 1998. Pierce was an experienced real estate investor and helped the Bells purchase their home at 3206 Galli in Hawthorne (the Bells' home) in 2003.

In 2004, Pierce's mother died and he became sole owner of her house, a single family residence located at 17202 Elgar Avenue in Torrance (the Property). When Pierce

told Vanessa[1] that he wanted to sell the Property, Vanessa told him that she and Michael wanted to purchase the Property but needed to refinance their home in order to come up with the down payment. Pierce wanted immediate cash flow and suggested a lease with an option to buy while the Bells refinanced their home and arranged a purchase loan for the Property. Negotiations between Vanessa and Pierce culminated on December 30, 2004, when they signed two documents Pierce drafted—the "Month to Month Rental Agreement with an Option To Buy Addendum" (Rental Agreement) and the attached "Option To Buy Addendum" (Option) for the Property.

The Option provided a purchase price of $475,000 for the Property, a $40,000 cash down payment, a $285,000 first trust deed from a new conventional loan, and a $150,000 second trust deed from Pierce, with "[o]ther terms of a standard purchase contract to be agreed upon at the time of the sale." The Bells' $1,500 rental deposit and $500 per month of rent paid would be credited toward the down payment. The Option expiration date was May 30, 2005. The Bells agreed that $475,000 was a reasonable purchase price.

In January, Vanessa contacted the Bells' loan broker, Richard Grea (Grea) to apply for the first trust deed loan for the Property purchase. Grea was already processing their home refinance application. The refinance loan he soon obtained included $54,000 cash out to the Bells. Early in his search for the Property loan, Grea determined that Michael's credit score was high enough for the Bells to qualify for any loan.

Vanessa told Pierce that the Bells wanted to proceed with the purchase. Pierce filled in the blanks on the forms and presented to Vanessa a "Pre-printed Real Estate Purchase Agreement and Receipt for Deposit," dated March 1, 2005, and another document entitled "Addendum to Real Estate Purchase Agreement and Receipt for Deposit" (Addendum, collectively the March 1 Purchase Agreement). The March 1

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[1] For convenience in identifying the parties and intending no disrespect, we will identify the Bells individually by their first names—Vanessa or Michael—and collectively refer to them as the Bells.

Purchase Agreement included the following terms: a purchase price of $325,000 for the Property, a $40,000 cash down payment ($5,000 deposit at time of signing the agreement, plus $35,000 deposited into escrow before closing), a $285,000 first trust deed loan on "terms to be best available to buyer," a 60-day escrow, and other terms commonly used in such agreements, such as provisions for the seller to pay for a title insurance policy and the buyer and seller to each bear half of the escrow fee, as well as a default clause. The default clause provided that, in the event of legal action to enforce the agreement, the prevailing party would be entitled to recover his reasonable attorney's fees.

Vanessa, Michael and Pierce met at the Property on March 1, 2005 and signed the documents. Pierce did not add any annotation to indicate that his signatures were conditional.[2] Before the Bells signed, they noted that the purchase price differed from the Option and there was no mention of a second trust deed to Pierce. They asked Pierce about the discrepancy. They signed after Pierce indicated to them that he knew how to do these things and that they should sign. Although they signed, the Bells continued to be willing to pay the $475,000 purchase price and give Pierce a note secured by a second trust deed, as provided in the Option.

Vanessa gave Pierce a deposit check for $5,000, made payable to the escrow company Pierce selected, Chicago Title. Pierce took the signed March 1 Purchase Agreement and the deposit check with him when the meeting ended.

The next day, Pierce faxed the Bells a document identified as Counter Offer No. 1, bearing his signature dated March 2, 2005. It provided that Pierce accepted the March 1 Purchase Agreement subject to the following conditions: (1) "The seller carried back second trust deed for $150,000 will be covered by a title insurance policy which premium

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[2] On the March 1 Purchase Agreement offered into evidence by Pierce, a handwritten line appeared just above Pierce's signature on the Addendum. The line read "Approved subject to promissory note and counter # 1." Vanessa testified at trial that the line was not there when Pierce signed the Addendum. The trial court found her testimony to be credible.

is to be paid by seller"; and (2) The "prequalification letter required in paragraph J of the 'ADDENDUM' is to be from the first trust deed lending bank and not from a broker"; the letter must recognize the second trust deed and, if it did not, then buyer and seller had to "agree on the procedure to guarantee item 1 above prior to opening escrow"; escrow would not be opened until after seller received a copy of the letter. The Bells believed Pierce had made an unacceptable change in the terms of the deal but still wanted to purchase the Property. Eventually they signed Counter Offer No. 1, subject to their Counter Offer No. 2. Their signatures were dated March 15, 2005.

On March 3, Pierce left Vanessa a voicemail message that he could carry the entire loan amount, she would not have to worry about going to a bank, and the loan would have a low monthly payment. Later that day, Pierce faxed a handwritten letter to the Bells setting forth the terms mentioned in his voicemail. Pierce stated in the letter: "I can carry the entire loan on the same terms as Downey Savings. [¶] $475,000 price = $47,500 down + $427,500 loan. [¶] $712.50 monthly payment first year = 2.00%. [¶] $766.00 . . . second [year] . . . [2.00%] (plus [about] $55 [per] year). [¶] Adjustable interest rate = MTA + 2.65 . . . . [¶] Due in 6 years. [¶] Advantages: . . . [¶] No qualifying, I already qualified you. [¶] No loan docs, need to redo our note & TD only. [¶] Very fast escrow . . . . [¶] Only deal with one loan."

The Bells informed Grea that they would not need another loan, in that Pierce wanted to carry the entire loan, and Grea stopped efforts to obtain the purchase loan from an institutional lender.

Using the terms Pierce had given in his voicemail message and letter, the Bells prepared and sent Pierce their Counter Offer No. 2, dated March 8, 2005. Counter Offer No. 2 incorporated the March 1 Purchase Agreement by reference and accepted Counter Offer No. 1, subject to the following conditions: "Loan carried by seller under the following terms. $475,000.00 total purchase price [to be paid with] Total good faith down payments received by seller $8,000.00 minus $47,500.00 equals $39,500.00 total balance due for down payment [plus a] $427,500.00 loan"; specified monthly payments at specified rates for the first through the sixth years; and Pierce to pay for fumigation

service and any related necessary major repairs, as well as any necessary major plumbing and electrical repairs. Under the Bells' signatures, Pierce hand-printed, "Accepted subject to Counter #3," below which he added his signature, dated March 15, 2005.[3]

Prior to signing Counter Offer No. 2, however, Pierce faxed a letter to the Bells, asking them to sign a provision in the letter that they would not exercise the Option and would rescind it. When Vanessa asked Pierce about the letter, he explained that, because the Bells and Pierce had an original purchase agreement, Pierce could not officially accept any counter offer until the Bells rescinded the Option. The Bells did not sign the provision.

Pierce prepared and submitted Counter Offer No. 3, with a letter stating: "Please inspect #3 [and] call if any questions. I did not change any terms or figures, just broke them down into details so there will be no misunderstanding." Counter Offer No. 3 incorporated the March 1 Purchase Agreement by reference and accepted Counter Offers No. 1 and No. 2, subject to the following conditions: "Purchase price to be $475,000.00 consisting of $47,500.00 down payment and one loan of $427,500.00" carried by Pierce; with $8,000 credit against the down payment;[4] escrow to close no later than April 30, 2005; monthly payments specified for each year for six years, with all principal and interest due after the sixth year; adjustable interest rate equal to the MTA index plus 2.65 percent; no prepayment penalty, no loan origination costs, no mortgage insurance charges; Pierce to pay for title insurance policy in the loan amount, transfer tax,

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[3] Pierce presented another copy of Counter Offer No. 2, which bore the additional phrase "[and] Loan approval" above his signature. Vanessa testified that the first time she saw that version was at Pierce's deposition after this action had been initiated. Finding that Vanessa's testimony was credible and Pierce's was not, the trial court found that the phrase did not appear on the Bells' copy and, therefore, that the Bells did not approve the added phrase.

[4] The $8,000 credit included the Bells' $5,000 deposit check given upon execution of the March 1 Purchase Agreement, plus $1,500 rental deposit and $500 per month of rent for January, February and March 2005 as provided by the Option.

fumigation and, if any, major plumbing and electrical problems; counter offer to expire March 18, 2005. Counter Offer No. 3 also provided that "[t]he Option . . . is hereby rescinded . . . and replaced by this purchase contract instead."

At Pierce's suggestion, the Bells met him at a coffee shop to finalize the documents on March 21, 2005. The Bells signed Counter Offer No. 3 and, at Pierce's direction, they back-dated their signatures to March 18, 2005. Pierce's signature was dated March 15, 2005. Pierce also had Counter Offer No. 2 with him, and his signature on that document was dated March 15, 2005. At Pierce's suggestion, he and the Bells went to Chicago Title immediately and met with escrow officer Carolyn Gephard (Gephard) to open escrow. Pierce gave Gephard the information for preparation of escrow instructions and returned later in the day with the Bells' $5,000 earnest money check. Pierce did not ask the Bells for a loan application. After the Bells left Chicago Title, Vanessa received a voicemail message from Pierce that he had arranged for the termite inspection and also a faxed note from him indicating the termite fumigation was scheduled for the following Thursday.

On Friday, March 24, when Pierce learned the fumigation had been completed without his being present, he left Vanessa a voicemail message that he was angry about it. After subsequent telephone communications, Pierce left a voice message in which he stated, "Let's try to figure out a way of getting out of this without killing each other. This is not working. Call me." Then the Bells went to the Property. Affixed to the door, they found a 30 Day Notice to Quit the Property from Pierce.

The next day, March 25, Pierce met with escrow officer Gephard and unilaterally issued written instructions to Chicago Title to cancel the escrow. Later in the day, at an appointment to sign the escrow instructions that the Bells had previously scheduled with Gephard, she gave them a copy of Pierce's cancellation instructions.

The Bells still wanted to purchase the Property. During the next few days, Vanessa talked with Pierce by telephone several times attempting to revive the purchase transaction. During a conversation, Pierce told Vanessa that he would sell the Property to her if she divorced Michael and further, if she would marry Pierce, he would give her the

Property. Vanessa refused his offers. Promptly thereafter, the Bells' attorney sent Pierce a letter demanding he proceed with the sale.

Before the Bells filed suit, Pierce caused a deed of trust to be recorded on April 7, 2005, which purported to encumber the Property as security for a $100,000 loan to Pierce from Central Thrift Inc. (Central Thrift). On May 23, 2005, he caused to be recorded another deed of trust for a $500,000 loan to Pierce from Central Thrift. Both deeds were dated March 26, 2005 and listed Pierce's name and address in the "When Recorded Mail To" box. The Bells received no notice of the transactions.

The Bells filed the instant specific performance action against Pierce on April 27, 2005 to enforce the purchase agreement (the specific performance action).[5] Shortly thereafter, they recorded a lis pendens. Pierce filed his second unlawful detainer action to evict the Bells from the Property. He had filed an earlier action but dismissed it.

In June 2005, the Bells made an ex parte application for either a temporary restraining order to bar Pierce from filing monthly unlawful detainer actions or an order consolidating the specific performance action with the second unlawful detainer action. The trial court denied the application, allowing the pending second unlawful detainer action to proceed to trial. Judgment was entered in the action in favor of the Bells and against Pierce.

In August 2005, Pierce filed a third unlawful detainer action against the Bells (the unlawful detainer action).[6] The Bells again made an ex parte application for either a temporary restraining order or consolidation.

With the attorneys for the Bells and for Pierce present, the trial court conducted a hearing on the Bells' ex parte application together with Pierce's most recent motion to

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[5] The Bells' specific performance action to which this appeal pertains is Los Angeles County Superior Court Case No. BC332515.

[6] Pierce's unlawful detainer action to which this appeal pertains is Los Angeles County Superior Court Case No. SB05Z00657.

quash service. The trial court announced its decision to order consolidation, citing the savings in judicial resources and the potential legal effect of the specific performance action on the merits of the unlawful detainer action. On September 30, the trial court issued its notice of entry of order.

Pierce filed a motion for reconsideration of the consolidation order on October 18, 2005. In another Department, Pierce concurrently moved for transfer of both actions to the Southwest Division in Torrance. The address Pierce used to justify the transfer was the address of the flower shop where he had a mail drop. After a hearing on November 17, the trial court denied Pierce's motions, finding that, inter alia, Pierce tried to mislead the court and delay the judicial process; as to the reconsideration motion, Pierce failed to present new facts or law as required by Code of Civil Procedure section 1008; and, as to the transfer motion, Pierce misstated where he lived. The Bells had included a request for sanctions in their opposition papers, which the court took under submission, ordering Pierce to respond. Several weeks later, in January 2006, the trial court issued an order for Pierce to pay $2,500, the amount of attorney's fees the Bells incurred to respond to Pierce's motion, as sanctions for having brought the motions, with payment due within 20 days.

Two months later, on March 21, 2006, purportedly based upon the Bells' failure to pay rent as the supporting new facts, Pierce made an ex parte application to sever the unlawful detainer action for trial or to shorten time for a trial-setting motion. Pierce's new counsel, Stanley Bowman (Bowman), and the Bells' attorney were present at the hearing. Bowman represented to the court that what Pierce actually wanted was for the court to order the Bells to comply with the court's previous order requiring them to pay rent, and that he did not really care about the severance. The trial court responded that there was no such prior order for rent payment.

The trial court then noted that Pierce had brought several unlawful detainer cases against the Bells, one unlawful detainer case had been tried, Pierce lost, and that Pierce was now, in effect, bringing another motion for reconsideration of the consolidation order, trying to undo all that the court had done in the last few months with respect to the

unlawful detainer action. The court acknowledged that as an attorney new to the case, Bowman may not have known the history of proceedings, but Pierce knew and should have not allowed the motion to be brought. The trial court denied the motion and ordered Pierce to pay sanctions of $1,000, the sum of the Bells' attorney's fees incurred in responding to Pierce's application, with payment due in 10 days.[7]

The trial began on July 24, 2006 before the trial court, sitting without a jury. A few days later, the Bells' attorney, Richard Terzian (Terzian), received a call from Kevin Koh (Koh), expressing interest in bidding at a foreclosure sale of the Property to be held on July 28, 2006. That was the first notice that Terzian or the Bells had of the deed of trust Pierce had recorded in April 2005, encumbering the Property with the $100,000 loan from Central Thrift and that the loan had gone into foreclosure. The Notice of Trustee's Sale indicated that Entertainment Productions, Inc. (Entertainment Productions), as Trustee, would hold a foreclosure sale on the Property four days later, on July 28, 2006 at 5:00 p.m., at the front entrance of 13230 Penn Street, Whittier, California 90602. The Notice further stated that the sale resulted from Pierce's failure to pay the note secured by the deed of trust recorded on April 7, 2005, and the balance due to Central Thrift on the note was $126,168.80.

On the day noticed for the sale, July 28, 2006, the Bells filed an ex parte motion to have the foreclosure sale stayed. At the hearing held at 1:30 p.m., the trial court found that allowing the sale to proceed "would be an unwarranted interference with this Court's jurisdiction" and issued a written order staying the sale.[8] Pierce's counsel was present and the Bells' attorney served him immediately with a copy of the order.

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[7] As of the time judgment was entered, Pierce had not paid the sanctions imposed as a result of his motions.

[8] The July 28, 2006 order provided that "Entertainment Productions, Inc. as trustee, Central Thrift Inc. as beneficiary, Sam Pierce as trustor, and . . . all other persons and entities acting in concert with or participation with them, including but not limited to Pacific Property, Inc. and Angeles Management, Inc., are hereby enjoined and prohibited

About half an hour prior to 5:00 p.m., the time noticed for the sale, Terzian arrived at the address on the sale notice and learned it was the Whittier City Hall. Koh and two other individuals who identified themselves as investors wanting to bid on the Property arrived. They all remained at the City Hall steps until 5:30 p.m. No one appeared on behalf of Entertainment Productions or Central Thrift. No foreclosure sale was held.

While trial was continuing, on August 21, 2006, Terzian requested a search of the County Recorder's records to confirm no further documents had been filed that would cloud title to the Property. The search yielded a Trustee's Deed, recorded July 31, 2006, which stated that the Trustee, Entertainment Productions, had sold the Property, at the time and place on the Notice of Trustee Sale on July 28, 2006, to Western Properties Trust for $450,000. The address for sending the trustee's deed after recordation was to W/E Investigative Services (W/E Services) in Torrance. The signature on the Trustee's Deed was "Kekupaa Kuewa, Agent for Trustee" (Kuewa).

Also found was a deed of trust recorded on August 1, 2006 and dated July 28, 2006, the foreclosure sale date. The deed of trust was executed by Western Properties Trust and encumbered the Property to secure a note of $455,000 to Central Thrift. The address for sending the deed of trust after recordation was to Central Thrift in Butschwif, Switzerland. The signature on the deed of trust was "Earl Cannoles, VP W/E Investigative Services Inc., Trustor for Western Properties 2005 Irrevocable Trust" (Cannoles). The notarizations on both the deed and the deed of trust were dated Sunday, July 30, 2006, by the same notary public, Marlea M. Ramsey (Ramsey).

Terzian made an ex parte application for a second order prohibiting Pierce and those acting in concert with him from further actions affecting title to the Property. The trial court issued the order on August 31, 2006.

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from proceeding with said Trustee's Sale or taking an other action affecting any right, title or interest in said real property until further order of this Court."

At trial, the Bells presented testimony from Kuewa, Cannoles and Ramsey. Initially Kuewa and Cannoles refused to appear, but they responded to the trial court's subsequent order to appear under penalty of contempt. They testified that Kuewa, Cannoles, Ramsey and Pierce met at a coffee shop on Sunday, July 30, 2006 (the coffee shop meeting). Pierce claimed to be present as the agent of Entertainment Productions. The deed and the deed of trust were signed in the presence of and notarized by Ramsey at the meeting. Ramsey had not met any of the three men prior to the meeting. Pierce had called her to attend in order to notarize some documents, and he paid for her services.

Kuewa was a computer technician who had worked on computers for Bowman from time to time. Bowman asked him to conduct a foreclosure sale for Entertainment Productions even though Kuewa had no experience with such sales. Kuewa agreed to conduct the sale, which was to be at the Whittier City Hall.[9] Kuewa testified that he was notified to attend the coffee shop meeting by email from a third party.

At the coffee shop meeting, Pierce gave Kuewa the Trustee's Deed, all filled out except for the signatures and dates. The signing and entry of dates took place at the meeting. Kuewa never saw the Notice of Trustee's Sale. He did not know about the trial court's pre-sale order staying the sale and would not have participated in the transaction if he had known. At the meeting, Pierce paid Kuewa $400 in cash for his services. Kuewa did not keep copies of any of the documents signed at the meeting or file any of them with the County Recorder's office.

Cannoles had known Bowman for some time and had been a process server for him. Cannoles was retired, but he was also one of two partners in W/E Services. Bowman was the attorney for W/E Services.

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[9] Kuewa also testified as follows: He conducted the sale around 5:00 p.m. on the Whittier City hall steps. The only other person present was Cannoles, who told him he was there for the foreclosure sale representing Western Properties. When Kuewa opened the sale for bids, Cannoles bid $450,000 and Kuewa said "sold." His testimony about where and when the sale documents were signed was inconsistent. The trial court found Kuewa's testimony about the foreclosure sale was not credible.

According to Cannoles, about three or four days prior to the foreclosure sale date, Bowman told Cannoles about the sale in the event Cannoles was interested in obtaining the Property. Cannoles had gone to the Whittier Courthouse for the sale and bid $450,000. Kuewa called on the morning of the coffee shop meeting and told him to go to the meeting to sign a document. Kuewa, Cannoles, Pierce, Ramsey and her husband were present. Cannoles signed the deed of trust as Vice President of W/E Services, which was the trustee of the Western Properties Trust. Cannoles was the sole owner of the Trust and created it himself in October 2005, without a lawyer, for the benefit of his grandson.

Cannoles did not know why the deed of trust was for only $445,000 or why Central Thrift was shown as beneficiary. The foreclosure sale was the first time he ever bought or sold real estate. He did not know about the trial court's pre-sale order staying the sale and would not have participated in the transaction if he had known. He did not file the Trustee's Deed or deed of trust with the County Recorder's office.

According to Cannoles, he signed a promissory note for $450,000, the full amount he bid, payable to Entertainment Productions which had owned the Property, because he had no money for a down payment. He did not keep a copy of the note and did not know the terms of the note. He believed the first payment was due September 15, 2006, payable to Entertainment Productions, in the amount of "about 100-some-odd-thousand" dollars. He did not open an escrow or do a title search on the Property.

Subsequent to the testimony of Kuewa and Cannoles, the Bells' attorney, Terzian, began cross-examining Pierce with respect to his ownership interest in Central Thrift. After Pierce testified that he owned stock, Bowman instructed him not to answer further questions about Central Thrift on "possible Fifth Amendment grounds." The trial court inquired if Pierce needed to be represented by a criminal lawyer and Bowman indicated that he did not. Then the court asked Terzian for an offer of proof as to what such a line of questioning would show. Terzian gave a detailed offer of proof, representing that Pierce owned and controlled Central Thrift and several other entities and therefore, that any judgment rendered in favor of the Bells should also apply to each of the entities.

After conferring with counsel in chambers, the court announced that the parties had agreed to sever the issues regarding Pierce's relationship with the entities for consideration at a later hearing and would proceed with redirect examination of Pierce by Bowman on other issues.

On August 31, 2006, the court held a hearing on the Bells' ex parte application for an order prohibiting defendant and other persons and entities involved in the foreclosure sale from further actions affecting title to the Property until further order by the court. The court issued the order.

On the next date of the trial, September 11, 2006, Pierce did not appear even though Terzian had not yet completed his cross-examination with respect to Pierce's interest in or control of the entities involved in the foreclosure sale. The trial court granted plaintiffs' motion to strike all of Pierce's prior testimony. Pierce did not appear on the next trial date, September 13. Plaintiffs renewed their motion to strike all of Pierce's testimony. The trial court granted the motion, provided that any exhibits introduced through him would remain in evidence.

Trial ended on September 13, 2006. The trial court orally announced a decision in favor of the Bells. Bowman requested a statement of decision. At the court's request, Terzian submitted a proposed statement of decision. Bowman submitted objections to it. The trial court adopted and issued the Terzian proposal as its statement of decision on November 21, 2006.

The trial court also permitted the Bells to amend their pleading according to proof at trial. The Bells submitted the first amended complaint on October 13, 2006. They named Doe defendants 1 through 9, including Western Properties Trust. In addition to their initial cause of action for specific performance, they added causes of action for alter ego against Pierce and three other entities and conspiracy to defraud against all defendants, including Western Properties Trust.

As set forth in the statement of decision, the trial court found that the purchase agreement between the parties consisted of the documents from the Option culminating in Counter Offer No. 3. The purchase agreement contained all essential terms, was

sufficiently certain to be enforced through specific performance and was not illegal. The Bells were ready, willing and able to complete the sale and were entitled to specific performance.

More specifically, the trial court found that the parties entered into the Option for a purchase price of $475,000, including a $40,000 cash down payment with credit for the Bells' rental deposit and $500 per month of the rent the Bells paid, a first trust deed for a $285,000 conventional loan and a second trust deed for $150,000 to be carried by Pierce, with other terms of a "standard purchase contract" to be agreed upon at the time of the sale. The Bells exercised their option to buy the Property by entering into the March 1 Purchase Agreement and giving Pierce a $5,000 earnest money check. Pierce set additional terms in Counter Offers No. 1, No. 2 and No. 3, and all parties signed them. It was Pierce's idea to change the financing to provide that he would carry the entire loan. All the parties signed Counter Offer No. 3, with no specified contingency for the effectiveness of their signatures as indicating agreement. Counter Offer No. 3 provided for a purchase price of $475,000, including a $47,500 cash down payment with credit for the $5,000 earnest money already paid, the rental deposit, and $500 per month of the rent the Bells paid prior to closing. When Counter Offer No. 3 was signed on March 21, 2005, Pierce and the Bells believed they had a binding purchase agreement and they opened escrow.

With respect to the Central Thrift loans and foreclosure sale, the trial court found that the Central Thrift liens and the foreclosure sale were shams for which Pierce was responsible. Central Thrift and three other entities were alter egos of Pierce. Entertainment Productions, Western Properties Trust, W/E Services, Cannoles, Kuewa and Bowman were all acting at the direction of and under the control of Pierce or as Pierce's agents in connection with the Property. The pleadings and judgment were amended according to proof to include the alter ego entities and the controlled entities as defendants. During the litigation, Pierce attempted to deceive the Bells and the trial court and engaged in fraud and perjury. Having prevailed in the specific performance action, the Bells prevailed in the consolidated unlawful detainer action as a matter of law. The

trial court added to the proposed statement of decision: "It must be emphasized that Mr. Pierce had little regard for the truth while testifying and his testimony was not credible."

The Bells presented a proposed written judgment to the trial court. Pierce filed objections to the judgment. The trial court issued the proposed judgment as the final judgment on November 21, 2006.

The judgment provided that the Bells prevailed in the specific performance action (Case No. BC332515) and the unlawful detainer action consolidated with it (Case No. SB05Z00925). Pierce was to convey the Property to the Bells within 60 days after the judgment. The recorded trust deeds with Central Thrift as beneficiary, as well as the Trustee's Deed with Western Properties Trust as grantee, were fraudulent conveyances and were null and void. The Property would be conveyed with a clear title free from all liens and encumbrances except those arising from the Bells' purchase and related financing.

The judgment set forth specific terms of the purchase of the Property: The purchase price was $475,000, with a total down payment of $47,500, of which the Bells must pay $5,000 immediately to Pierce and the remainder of the down payment, $42,500, within 60 days of the judgment. The Bells were to execute and record a deed of trust securing a note in the amount of $427,500 (the balance of the purchase price) in favor of Pierce. The note would have "an adjustable interest rate from the date of close of escrow on the unpaid principal at the starting rate of 4.77% per annum. The principal shall bear interest at the adjustable rate of the MTA index plus a margin of 2.65%."

The judgment set forth the specific amount of the monthly installment for each month through "six (6) years from the close of escrow." At the time of the last monthly installment, payment in the amount of the remaining unpaid principal and interest would be due. There was to be no prepayment penalty. After the payment provisions, the judgment included three "standard" real estate transaction provisions: acceleration of payment for all sums secured in the event the Trustor sells any or all its interest in the Property; delinquent payment charges; and notice prior to balloon payment coming due, as required by Civil Code section 2966.

Finally, the judgment provided that the $47,500 down payment would be reduced by the amount of $16,328.91. That sum included the amounts to be credited against the down payment pursuant to the Option—the Bells' rental agreement security deposit plus $500 for each of the three months the Bells paid rent prior to Pierce's breach of the purchase agreement in late March 2005. The sum also included the amount the Bells paid Pierce as rent after the breach, from April 2005 through January 2006. The judgment provided for a further offset of the down payment in the amount of $28,500, representing ancillary damages measured as the fair rental value of the Property of $1,500 per month commencing April 1, 2005 to the date of the judgment. Last was an offset for $3,500, which was the amount of sanctions the trial court had imposed on Pierce prior to trial, but Pierce had not paid as ordered. The total of the amount to be offset was $48,328.91. The down payment being $47,500, the remaining $578.91 was to be credited toward the Bells' next loan payment to Pierce.

The Bells then moved for award of attorney's fees. After a hearing on February 15, 2007, the trial court issued an order granting the Bells their costs including attorney's fees of $226,577.74 for litigating the specific performance action and the unlawful detainer action. The order specified that Pierce and the added defendants, including Western Properties Trust, were jointly and severally liable for payment.

## DISCUSSION

### A. *Property Purchase Contract*

Pierce's primary contention is that, as a matter of law, there was no enforceable real estate purchase contract. He asserts that, therefore, the judgment for specific performance of the purported agreement must be reversed. We disagree.

#### 1. Standard of Review of Contract Claims

The question whether the purported purchase contract is sufficiently definite and certain to be specifically enforced is one of law, subject to our de novo review on appeal.

(*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 142.) Whether such contract exists is a question of law, subject to our independent review on appeal, only if the requisite facts are certain or undisputed. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Where, as here, the evidence is conflicting or gives rise to more than one inference, the existence of the contract is a question of fact for the trial court to determine, and we must uphold the determination if it is supported by substantial evidence. (*Bustamante*, *supra*, at p. 208; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

The trial court issued a lengthy statement of decision which set forth findings and law as the basis for the judgment. We look to the statement of decision to determine whether the trial court's decision is supported by the facts and the law (*In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 477, fn. 7) and apply the substantial evidence standard of review to both express and implied findings of fact (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500-501).

Our power "'begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support'" the trial court's findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, quoting *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429.) Evidence is "substantial" if it is of ponderable legal significance, reasonable, credible and of solid value. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 631.) The testimony of a single witness can constitute substantial evidence sufficient to uphold a finding of the trial court. (*City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 56.) In applying the substantial evidence standard, we resolve any conflicts in the evidence or reasonable inferences arising from the facts in support of the trial court's decision. (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342.)

Weighing the evidence and determining its credibility are within the sole province of the trier of fact. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 630; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) We must defer to the trial court's credibility determination and may reject evidence the court found credible only if its truth is a

physical impossibility or its falsity is apparent without resorting to inferences or deductions. (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.)

In the instant case, the trial court found that the Bells' testimony was consistent, credible and supported by third party witnesses. The trial court expressly found Pierce's testimony was not credible. Key documents offered into evidence by Pierce were identical to documents offered by the Bells except for handwritten additions by Pierce. The trial court found that Pierce's versions were not credible. We are bound to uphold the trial court's determinations as to credibility as we review the record for substantial evidence. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53; *Evje v. City Title Ins. Co.*, *supra*, 120 Cal.App.2d at p. 492.)

**2. Contract Formation**

Pierce correctly asserts that a meeting of the minds is required to form a contract. "Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358-359.) His arguments, however, focus on procedure rather than intent of the parties.

Pierce contends that the Bells did not sign Counter Offer No. 3 before its expiration date and, thus, no contract was formed, relying on *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at page 358 for the proposition that "[w]hen it is clear . . . from a provision that the proposed written contract would become operative *only* when signed by the parties . . . , the failure to sign the agreement means no binding contract was created." He further claims that his oral instruction to the Bells to back-date their signatures did not operate to revive the purportedly expired counter offer. Without the Bells' timely signature, no sale contract was formed, in that a sale agreement for real property is subject to the statute of frauds and must be in writing (Civ. Code, § 1624, subd. (a)(3); Code Civ. Proc., § 1971) and, pursuant to the parol evidence rule, no prior or contemporaneous oral expression can modify the offer's express written terms (Code Civ. Proc., § 1856, subd. (a)).

We agree with the trial court's implied finding that, in view of the facts and circumstances in the instant case, the timeliness of the Bells' execution of Counter Offer No. 3 is not determinative as to the existence of a purchase contract between the parties. First, as the trial court noted, "[a]n agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding. A memorandum of the agreement (Civ. Code, § 1624[, subd. (a)]) is sufficient, and this may be found in one paper or in several documents . . . ." (*King v. Stanley* (1948) 32 Cal.2d 584, 588, citations omitted.) The existence of a binding agreement that is not fully set forth in writing "is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at p. 358.) Conduct of the parties can fulfill "'the evidentiary function of the statutory formalities'" of the statute of frauds as to the parties' mutual intent. (*Sutton v. Warner* (1993) 12 Cal.App.4th 415, 422.) It is well-established "that courts have the power to apply equitable principles to prevent a party from using the statute of frauds where such use would constitute fraud." (*Juran v. Epstein* (1994) 23 Cal.App.4th 882, 895.)

The trial court found that the "contract of sale between the parties is reflected in a number of documents, starting with the option to buy addendum and culminating in Counter Offer No. 3." In accordance with its credibility determinations, the trial court found that Pierce and the Bells signed the Option, the March 1 Purchase Agreement and Counter Offer No. 3, each without any conditions placed on the effectiveness of their signatures as assent to the terms of the document. The March 1 Purchase Agreement and Counter Offer No. 3, either individually or together, are sufficient to satisfy the statute of frauds requirement for an agreement for sale of real property to be in writing. (Civ. Code, § 1624, subd. (a)(3); *King v. Stanley*, *supra*, 32 Cal.2d at p. 588.)

Second, Pierce's conduct in relation to Counter Offer No. 3 constitutes substantial evidence which supports the trial court's finding that Pierce intended and believed there was a meeting of the minds and that he had a binding contract with the Bells when they signed Counter Offer No. 3. (*Western States Petroleum Assn. v. Superior Court*, *supra*, 9

Cal.4th at p. 571; *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at pp. 358-359.) Pierce initiated the opening of escrow immediately after the Bells signed Counter Offer No. 3 and a day later, he scheduled the termite fumigation which was a condition to closing escrow.[10] Pierce set the terms for, drafted and timely signed the March 1 Purchase Agreement and Counter Offer No. 3, which embody the agreement he now seeks to avoid. We agree with the trial court that his conduct is inconsistent with his claim that no contract was ever formed.

Pierce alternatively contends that the trial court's determination that a sale contract existed cannot be affirmed, in that the statement of decision does not set forth the terms of the agreement. We disagree.

A statement of decision need not set forth every factual finding made by the trial court; only ultimate facts found by the trial court and its determination of material issues are required. (*Ermoian v. Desert Hospital*, *supra*, 152 Cal.App.4th at pp. 499-500.) While the specific contract terms may not have been fully set forth in the statement of decision, they were readily ascertainable from the documents which the trial court found constituted the agreement. (*Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at pp. 358-359.)

The trial court set forth terms of the agreement in the judgment. Each term corresponds to a provision in the March 1 Purchase Agreement modified as set forth in

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**10** Pierce asserts that escrow was never opened, in that the parties never signed the escrow instructions, and hence, the trial court could not rely on the opening of escrow as proof that Pierce believed there was a binding agreement. We do not agree that the signing of escrow instructions was necessary for the court to conclude that Pierce's initiation of the opening of escrow immediately after the Bells signed Counter Offer No. 3 showed that he believed the parties had a binding agreement. An agreement is formed before escrow is opened; escrow instructions simply restate the essential terms of the contract. (*Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1039.) In this case, the unsigned escrow instructions are consistent with the primary terms of the transaction as Pierce specified for Counter Offer No. 2 and drafted into Counter Offer No. 3: $475,000 purchase price, with $47,500 down payment consisting of $5,000 as the earnest money and $42,500 cash before the close of escrow and loan for balance of price.

Counter Offer No. 3. Thus, the inference is that the trial court found that the parties mutually intended to and did agree on the terms. (*In re Marriage of Ruelas, supra,* 154 Cal.App.4th at p. 344.) We conclude that there is substantial evidence to support the trial court's implied finding that the terms which the parties mutually intended to be part of the agreement are the terms specifically set forth in the judgment. (*Ermoian v. Desert Hospital, supra,* 152 Cal.App.4th at pp. 500-501.)

Although Pierce contends otherwise, the agreement includes all the material terms which have been held to be sufficient for enforcement of a real estate sale contract by specific performance: the seller, the buyer, the property, the price, the time and manner of payment. (*Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 239.) Pierce specified a purchase price in the March 1 Purchase Agreement which was inconsistent with the $475,000 price in the Option. Although Vanessa and Michael questioned the difference, they signed as Pierce instructed, but remained willing to pay the $475,000 price. The subsequent counter offers and other sale-related documents consistently showed the price as $475,000. Pierce set the down payment at $40,000 in both the Option and the March 1 Purchase Agreement. He increased it to $47,500 only after he asked to carry the total loan amount. Thus, substantial evidence supports a finding that the parties agreed on a purchase price of $475,000 and a cash down payment of at least $40,000 and no more than $47,500, the balance to be financed and escrow to be no longer than 60 days. (*City and County of San Francisco v. Givens, supra,* 85 Cal.App.4th at p. 56.)

As Pierce asserts, other terms are customarily included in a real property sale contract. The absence of such terms, however, does not negate the existence of a binding agreement. "Neither law nor equity . . . requires that every term and condition of an agreement be set forth in the contract. [Citations.] The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement. [Citations.]" (*Magna Development Co. v. Reed, supra,* 228 Cal.App.2d

at p. 236.) Pierce's claim as to absence of material terms essential to constitute a sale contract for the Property is without merit.

Pierce contends that the loan qualification requirement is a material term that was included in the March 1 Purchase Agreement and the counter offers, and the trial court erred in omitting it from the judgment. We disagree.

The terms in the judgment are based upon the terms Pierce set when he decided to carry the entire financing. Substantial evidence supports a finding that no loan qualification requirement applied to the loan Pierce offered to make. First, the sale offer—the Option—has no loan qualification provision. The March 1 Purchase Agreement includes a loan qualification provision, but only for the institutional loan. Neither the March 1 Purchase Agreement nor any of the counter offers contains any loan qualification requirement for the loan Pierce offered to provide.

According to Vanessa, within three days after the parties executed the March 1 Purchase Agreement, it was Pierce who asked the Bells if they were agreeable to his carrying all the financing. He represented in a note to Vanessa dated March 3, 2005 and a March 3 telephone message to her that the result of his providing all of the financing would be that there would be no institutional lender involved, no loan qualification for such lender, and he had already pre-qualified them.[11]

In sum, we conclude that substantial evidence supports the trial court's findings that (1) Pierce and the Bells signed the requisite written documents to satisfy the statute of frauds (Civ. Code, § 1624); (2) the documents set forth all the material terms of the agreement (*King v. Stanley*, *supra*, 32 Cal.2d at p. 588); and (3) Pierce and the Bells mutually intended to form a binding contract for sale of the Property on those terms

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**11** Pierce claims that the note (trial exhibit 43) and the Bells' transcription of his telephone message (trial exhibit 44) were erroneously admitted, in that they were not produced in discovery. Assuming arguendo that the trial court erred in admitting the documents, any error was harmless. (Evid. Code, § 353.) Since Pierce knew the content of the documents, he could not have been prejudiced by their admission. Moreover, the documents merely corroborated Vanessa's testimony regarding them.

(*Banner Entertainment, Inc. v. Superior Court, supra*, 62 Cal.App.4th at pp. 358-359). On that basis, the trial court properly concluded that a contract for purchase and sale of the Property existed.

**3. The Bells' Exercise of the Option**

Pierce claims that his obligations to sell under the Option never arose, in that the Bells never exercised the Option. The Option did not specify any particular procedure for the Bells to follow in order to exercise their option properly. An option to purchase real property is, in itself, a contract to keep an offer of sale open for the time specified in the contract. (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927-928.) The only requirement was that the Bells exercise the Option prior to its expiration date.

We agree with the trial court's conclusion that the Bells triggered the fulfillment of the requirement by unconditionally signing the March 1 Purchase Agreement. "An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract." (*Erich v. Granoff, supra*, 109 Cal.App.3d at p. 928.) When no condition precedent is specified in an option to purchase real property, the option may be validly exercised by a written communication by the optionees of their election to accept the optionor's offer prior to the expiration date of the option, as the Bells provided in this case to Pierce. (*Id*. at p. 929.)

The effectiveness of the Bells' acceptance of the offer Pierce made in the form of the Option is unaffected by the difference between the documents as to the purchase price and the total amount to be financed. Pierce drafted the agreement and set the terms in it. The Bells questioned the reason for the difference. They signed only when Pierce told them he knew how to do these things and that they should just sign. Pierce cannot escape liability by claiming that the Bells' execution of the March 1 Purchase Agreement was ineffective as the exercise of the Option. (See *Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 211-212.) An agreement exists if the parties have agreed to the terms, notwithstanding some variance in documentation. (See *Ersa Grae Corp. v. Fluor Corp.*

(1991) 1 Cal.App.4th 613, 624, fn. 3.) The Bells' testimony and their unconditional signatures on Counter Offer No. 2 confirmed their intent to agree to the purchase price and the amount to be financed which were specified in the Option. The Bells properly exercised the Option, and by signing the March 1 Purchase Agreement, the parties formed a binding contract of sale. (*Erich v. Granoff, supra,* 109 Cal.App.3d at p. 928.)

**4. Enforceability of Terms**

Pierce claims that the agreement terms set forth in the judgment are not enforceable, in that they are too uncertain, too vague and, as to the adjustable rate loan provisions, illegal. We previously addressed some of the claimed deficiencies. The remainder arise from the financing terms which Pierce himself originated after he decided to carry the entire loan. The record shows that there are sources to fill in the gaps, if any, as necessary for the contract of sale to be enforceable.

Pierce contends the loan portion of the contract of sale is unenforceable, in that it does not specify a cap rate for the negative amortization loan Pierce has offered. As support, he cites statements by the Bells' loan expert, Grea, that the documents fail to specify essential cap rates. Pierce fails to acknowledge that Grea also testified that he could surmise what the cap would be based upon the loan the documents alluded to and his knowledge of Downey Savings and Loan products in 2005. As previously stated, where terms are missing from a contract but may be inferred from other sources, they may be implied in order to find a valid contract. (*Magna Development Co. v. Reed, supra,* 228 Cal.App.2d at p. 236.)

Pierce claims that terms to resolve the following matters are also essential to enforcement, but are not expressly set forth in the judgment: (1) interest rates that will apply and periods for which each rate will apply during the six-year loan term; (2) amortization period; (3) what happens to accrued unpaid interest each month of the loan, given that the scheduled dollar amounts for the monthly payments are less than the amount of interest that would accrue; (4) the terms of the loan would result in a final payment that would be so onerous as to "lead to an almost—inevitable disaster for

everyone," resulting in the Bells losing the Property and Pierce losing the unpaid interest; and (5) Pierce's remedies if the Bells default, fail to pay taxes, or the house on the Property is destroyed.

The contract of sale identified the source of such terms. The Option refers to the terms of "a standard purchase contract." Counter Offer No. 3 includes "[o]ther terms . . . the same as the similar Downey Savings Adjustable Rate Loan."

In effect, Pierce is contesting his own work; if it is in error, then he is responsible for the deficiency. As the trial court found, Pierce is a sophisticated real estate investor. He cannot escape liability by his own wrongful conduct. (See *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218.)

The illegality he claims is limited to the adjustable interest rate formula he drafted and which he now claims is in violation of Civil Code section 1916.7. The provision appears to apply to a note, not a contract of sale. By its terms, section 1916.7 does not apply, for example, to Civil Code section 1916.5, which also pertains to adjustable rate loans. However, Pierce provides no explanation or other legal authority as to how section 1916.7 (rather than, for example, section 1916.5) applies to the parties' contract of sale and, if it applies, why the asserted noncompliance renders the entire contract of sale illegal and unenforceable. In the absence of such support for his claim, we decline to consider it. (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284.)

To be enforceable, the terms of a contract must be sufficiently certain, not fully and absolutely certain, for the parties and the court to determine what constitutes compliance. We conclude that the terms in the judgment for contract of sale are sufficiently certain to be enforceable.

**5. The Bells' Readiness and Ability To Perform**

A buyer seeking specific performance of a real estate sale contract must prove not only "that he was ready, willing and able to perform at the time the contract was entered into but that he continued ready, willing and able to perform at the time suit was filed and

during the prosecution of the specific performance action." (*C. Robert Nattress & Associates v. CIDCO* (1986) 184 Cal.App.3d 55, 64; see also *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1126.) Pierce contends that the Bells were not entitled to specific performance, in that they failed to meet this burden of proof.

The record shows that Pierce's contention is without merit.[12] The Bells' testimony that they had the ability to perform in 2005 as well as at the time of trial was corroborated by third parties. The Bells' real estate loan expert, Geary, opined that the Bells could have qualified for a bank loan at several places in order to close escrow in April 2005, and they could qualify for a similar transaction at the time of trial. The Bells' loan broker, Grea, corroborated their testimony that they had more cash than was required for the down payment from the proceeds of refinancing their home.

To prove they meet the ability-to-perform requirement, it is not necessary for buyers to show that they have a lender, currently legally bound to loan them the required funds to complete the transaction. (*Behniwal v. Mix, supra,* 133 Cal.App.4th at p. 1044.) The proof needed to show the ability to perform "depends [not on the existence of a legally enforceable loan agreement, but] on all the surrounding circumstances." (*Id.* at pp. 1044-1045, quoting *Henry v. Sharma* (1984) 154 Cal.App.3d 665, 672.) The evidence is sufficient if the buyers show that they had the financial ability to qualify for a loan. (*Behniwal*, *supra*, at p. 1045.) Here the testimony of the Bells, together with Geary and Grea, constituted substantial evidence supporting the trial court's finding that the Bells had the requisite ability to perform.

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[12] Pierce also contends that the Bells offered no evidence to prove their ability to obtain an adjustable-rate negative-amortization loan as provided in Counter Offer No. 3. He is mistaken to the extent he contends they had to prove an ability to obtain a certain type of loan. The only requirement was that they show the ability to pay off Pierce at the close of escrow, without regard to the type of loan they obtained.

Substantial evidence thus supports a finding that the Bells were ready, willing and able to perform their obligations at the requisite times. They did not tender any cash payment only because Pierce's breach prevented them from doing so. (*C. Robert Nattress & Associates v. CIDCO, supra,* 184 Cal.App.3d at p. 64.)

**B.** ***Ancillary Damages and Offsets***

Monetary relief may be awarded in a judgment for specific performance for the purpose of placing the parties in the same position as if the contract had been performed as of the date for performance set by the contract of sale. (*Ellis v. Mihelis* (1963) 60 Cal.2d 206, 220-221.) The determination is in the nature of "an equitable accounting for the intervening events during the period performance was delayed" rather than an award of legal damages. (*Stratton v. Tejani, supra,* 139 Cal.App.3d at p. 213.)

A successful plaintiff purchaser in a specific performance action is permitted, for example, to recover rents and profits from the date the seller was to perform the contract. (*Ellis v. Mihelis, supra,* 60 Cal.2d at p. 220; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 505.) The rents and profits may be deducted from, or offset against, the amount the plaintiff purchaser would otherwise be required to pay the defendant seller pursuant to the contract. (See *Ellis, supra,* at p. 220; *Bravo v. Buelow* (1985) 168 Cal.App.3d 208, 214-215.)

A defendant seller may recover interest on the purchase price that he would have received if the seller had performed at the time set by the contract. (*Ellis v. Mihelis, supra,* 60 Cal.2d at pp. 220-221.) The seller may offset the amount he is required to pay in rents and profits by the amount of interest to which the seller is entitled. However, a defendant seller may offset the interest only up to the amount of the rents and profits due the purchaser, and the purchaser is not required to pay any remainder to the seller, "for otherwise the breaching seller would profit from his wrong." (*Stratton v. Tejani, supra,* 139 Cal.App.3d at p. 213.)

**1. Rent Paid By the Bells as Offset**

As to the monetary relief awarded the Bells, Pierce first contends that there is insufficient admissible evidence to support the award of rents and deposits paid by the Bells under the rental agreement to the Bells as ancillary damages. As Exhibit 34, plaintiff's counsel offered the rent checks the Bells paid Angelus Management for the purpose of showing the relationship between the payee and Pierce. Pierce's counsel did not request the court to limit the purposes for which the checks were to be admitted. The court admitted the checks into evidence without limitation on their use.

Pierce claims the court erred in admitting the checks into evidence over his objection, in that there was no authentication or foundation. He relies on Evidence Code section 1401, subdivision (a), which provides that "[a]uthentication of a writing is required before it may be received in evidence," and *People v. Zoffel* (1939) 35 Cal.App.2d 215, which states at pages 220 through 221 that it is error to admit unauthenticated documents. In the record, we found no foundational evidence that the checks were ever submitted to or cashed by Pierce or his agent. The Bells have not cited any such evidence. Thus, the checks do not constitute substantial evidence of the Bells' payment of rent in the amount of $13,328.91 from February 2005 through January 2006. Accordingly, the judgment must be reversed to the extent that it provides for an offset of such rents.

**2. Option Offsets for the Bells' Pre-Closing Rent Deposits and Credits**

Pierce does not dispute that the Bells were entitled to apply toward their down payment their $1,500 rental deposit and the sum of $500 of their rent payment for each month of rent from January 2005 through March 2005, the period before escrow was to close in April. These amounts were agreed to as credits against the down payment in the Option and Pierce figured them into the credit against the down payment in the March 1 Purchase Agreement and Counter Offer No. 3. Accordingly, the trial court properly awarded the sum of these amounts, $8,000, as an offset against the Bells' down payment.

### 3. Fair Market Rental Value as Offset for the Bells

Pierce contends that the trial court erred in awarding the Bells "the fair rental value of the Property of $1,500 per month commencing April 1, 2005, to date of this Judgment." Pierce notes that the lost rents award for April 2005 through January 2006, $28,500, was added to the award for rents and deposits the Bells paid Pierce after he breached the contract. He claims the result is an award for lack of possession when, in fact, the Bells were in possession of the Property.

In *Ellis v. Mihelis, supra*, 60 Cal.2d 206, the Supreme Court discussed the principles governing calculation of damages incident to the decree of specific performance. The court noted that the incidental damages awarded should not place a real property buyer in a better position than if the contract had been timely performed. (*Id.* at p. 221.) "A court of equity will not permit a party to obtain such an undue advantage." (*Ibid*.)

In general, a buyer in possession is not entitled to recover the fair rental value of the property for the period the buyer has occupied the premises rent free. (*Stratton v. Tejani, supra*, 139 Cal.App.3d at p. 212, fn. 6.) Otherwise, the buyer would be put in a better position than if the contract had been timely performed. (*Ellis v. Mihelis, supra*, 60 Cal.2d at p. 221.) Accordingly, the award in the judgment of the offset for the fair rental value of the property, $28,500, must be reversed.

### 4. Sanctions Against Pierce as Offset for the Bells

With respect to the $3,500 offset for the unpaid sanctions, Pierce contends that the trial court erred in imposing sanctions on him with respect to his two motions to reconsider its order to consolidate the unlawful detainer action with the specific performance action.[13] The trial court awarded sanctions for noncompliance with Code of

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[13] Review of the record reveals substantial evidence of Pierce's actions which resulted in unwarranted delays in resolution of the proceedings, misleading the trial court, attempts to prevent the trial court from effectively exercising its jurisdiction, and

Civil Procedure section 1008, subdivisions (a) and (b),[14] which require that a party's application for reconsideration be "based upon new or different facts, circumstances, or law." Any violation of section 1008 "may be punished as a contempt and with sanctions as allowed by Section 128.7." (§ 1008, subd. (d).)

Pierce claims that the trial court failed to comply with the notice requirements in section 128.7, subdivision (c), in violation of his due process rights. "Adequate notice prior to imposition of sanctions is mandated not only by statute, but also by the due process clauses of both the state and federal Constitutions." (*O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961.)

The notice requirement for section 128.7 sanctions includes a "waiting period" of 21 days to provide a safe harbor to allow the allegedly offending party to withdraw or appropriately correct the challenged claim. (§ 128.7, subd. (c)(1) & (2).) The safe harbor requirement is mandatory for compliance with due process requirements. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1220 and fn. 3.) The record shows that Pierce was not provided with the required notice.

Due to the mandatory nature of the section 128.7 notice and safe harbor provisions, the sanctions awards totaling $3,500 must be reversed. (*In re Marriage of*

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knowing and intentional failure to comply with court orders, all of which resulted in an unnecessary drain on judicial resources. Yet, with no citation to legal authority, further citations to the record, or further argument, Pierce requests that, if this case is remanded for any reason, further proceedings be heard by a different judge, in that the sanctions awards are improper and are a "serious misjudgment (as well as others)." Pierce has failed to demonstrate prejudicial error or any basis for a remand, let alone hearing before a different judge. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

**14** Further statutory references are to the Code of Civil Procedure, unless otherwise identified.

*Reese & Guy*, *supra*, 73 Cal.App.4th at pp. 1220-1221.) It follows, therefore, that the portion of the judgment awarding the offset for the $3,500 sanctions cannot stand.[15]

**5. Pierce's Claim to Interest on Purchase Price as Offset**

Pierce contends that he should be permitted to offset interest on the entire purchase price against the compensation awarded to the Bells. He relies on *Ellis v. Mihelis*, *supra*, 60 Cal.2d which states at pages 220 through 221 that a defendant seller should be permitted to recover interest on the price that he would have received if the seller had performed at the time set by the contract. Pierce therefore requests that a new trial be granted to permit him to present evidence of his ancillary damages and offsets to which he is entitled.

Pierce does not, however, cite to any portion of the record in which he asked the trial court for such interest or other ancillary damages. Review of Pierce's written objections to the proposed judgment filed on November 2, 2006 shows no reference to a claim by Pierce for interest or any other ancillary damages. His failure to raise the issue below waives his claim on appeal. (*Hennefer v. Butcher*, *supra*, 182 Cal.App.3d at pp. 505-506.)

**C. *Unlawful Detainer Resolution***

Pierce claims that the trial court erred in determining that having prevailed on their specific performance action, the Bells prevailed on Pierce's unlawful detainer action against them as a matter of law. There is no merit to Pierce's claim.

As tenants with an option to purchase the property that they were leasing, the Bells became "vendees in possession" when they exercised the option and, thereby, created a binding contract to purchase the Property. (See *Erich v. Granoff*, *supra*, 109 Cal.App.3d

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[15] In light of this conclusion, we need not address the remainder of Pierce's claims regarding the sanctions awards.

at pp. 928-929; *Sacks v. Hayes* (1956) 146 Cal.App.2d Supp. 885, 887-888.) They signed the purchase agreement on March 1, 2005. As we discussed previously, the trial court properly found that they were willing and able to pay the purchase price and consummate the purchase in March 2005. As such, the Bells no longer had continuing rental obligations after March 2005. (See *Abadjian v. Superior Court* (1985) 168 Cal.App.3d 363, 372-373.)

Since the Bells were no longer tenants and no longer had an obligation to pay rent after March 2005, unlawful detainer was no longer an available remedy. (See *Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 450-451.) "The statutory situations in which the remedy of unlawful detainer is available are exclusive" (*Berry v. Society of St. Pius X* (1999) 69 Cal.App.4th 354, 363), and none of them applied under the facts here (§ 1161). Accordingly, the trial court properly ruled that, as a matter of law, the Bells prevailed in the unlawful detainer action.

**D. *Attorney's Fees Order***

Pierce contends that no contract provision authorizes an award of attorney's fees to the prevailing party, therefore the trial court erred in awarding such fees to the Bells. We disagree.

As we previously concluded, the trial court properly found that the Bells were the prevailing party in both the specific performance action and the unlawful detainer action. In the specific performance action, the sale contract provided for award of attorney's fees to the prevailing party pursuant to section 16 of the March 1 Purchase Agreement.[16] Pierce is mistaken in his claim that "the trial court found that Counteroffer No. 3 rendered

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[16] Section 16 in the March 1 Purchase Agreement provides as follows: "In the event legal action is instituted by the broker or any party to this agreement to enforce the terms of this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought."

the [March 1 Purchase Agreement] 'superfluous and irrelevant.'" The statement of decision includes the trial court's finding that the Bells exercised their option to buy the Property by entering into the March 1 Purchase Agreement and, when the parties signed Counter Offer No. 3, "[a]ll the intervening changes were rendered superfluous and irrelevant." The intervening changes were those represented by Counter Offer Nos. 1 and 2. Counter Offer No. 3 expressly incorporates the March 1 Purchase Agreement by reference and does not include any change to the attorney's fees provision. In a contract consisting of multiple documents, an attorney's fees provision can be enforced if it is in any one of the documents. (*Ganey v. Doran* (1987) 191 Cal.App.3d 901, 912, see *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 379.) The trial court therefore properly awarded contractual attorney's fees to the Bells as the prevailing party.

Although unnecessary to affirm the award, we also note our disagreement with Pierce's claim that the attorney's fees clause in the Rental Agreement is inapplicable, in that the clause applies only to "an action for the recovery of the premises."[17] Pierce reasons that the Bells' action was for specific performance of the sale contract and, therefore, did not qualify as an action to recover the premises. He ignores the ruling that the Bells were also the prevailing party in the unlawful detainer action, which was clearly an action for the recovery of the premises by Pierce.

**E. *Western Properties Trust Appeal***

Western Properties Trust (hereinafter also referred to as the Trust) challenges the trial court's findings that the foreclosure sale was void as being fraudulent and that the Trust is liable for the Bells' attorney's fees as Pierce's alter ego. The Trust asserts that the evidence was insufficient to support the findings, the trial court did not have jurisdiction over the Trust and acted in violation of the Trust's due process rights.

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[17] Section 14 of the Rental Agreement provides: "The prevailing party in an action for the recovery of the premises shall be awarded all the costs including attorney's fees, whether or not the action proceed[s] to judgement [*sic*]."

As an initial matter, it is important to clarify the trial court did not find that the Trust was Pierce's alter ego. Rather, the statement of decision provides that the court found that the Trust was "acting at the direction of Pierce at all relevant times in connection with the Property."[18] The only entities which the trial court found to be alter egos were Central Thrift, Inc., Atlantic Property, Inc., Angeles Management, Inc. and Pierce Family Trust.

The trial court disbelieved Cannoles' testimony concerning the existence and authenticity of the Trust. It did not believe that the Trust was a separate entity, unrelated to Pierce and uninvolved in his use of the fraudulent loans and sale in a wrongful attempt to oust the court of its jurisdiction over the Property. It thus determined that Pierce controlled the Trust and its actions with regard to the Property and was no more than a fictitious name used by Pierce and, thus, its acts were deemed to be the acts of Pierce. Inasmuch as credibility determinations and weighing the evidence were primary components of the trial court's determination, we are bound by that determination. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 630; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 52.) Accordingly, we need not address the Trust's claims that the trial court erroneously found it liable as an alter ego. We now turn to the remainder of the Trust's contentions.

**1. Fraudulent Conveyance**

The Trust challenges the sufficiency of the evidence to support the trial court's findings that the foreclosure sale is void and the deed purporting to convey the Property to the Trust to consummate the sale (deed to the Trust) is a fraudulent conveyance. The

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[18] Neither did the court find the Trust to be an alter ego when permitting the Bells to amend their complaint to name the Trust as one of the Doe defendants. The court expressly found it "clear that Entertainment Productions Inc., W/E Investigative Services, Inc., and Western Properties 2005 Irrevocable Trust are entities which are owned *or* controlled by Pierce *or* acting under his direction or the direction of his agent, Mr. Bowman." (Italics added.)

Trust, however, advances no argument with citation to the record and cites no legal authority directly applicable to the challenged findings. The supported arguments the Trust advances have no bearing on the invalidity of the foreclosure sale: The Trust argues that the trial court did not have jurisdiction over the Trust, abused its discretion in permitting plaintiffs to amend the complaint according to proof, erred in finding the Trust was Pierce's alter ego, and erred in naming the Trust as jointly and severally liable with other specified entities, in that such action constituted impermissible reverse piercing of the corporate veil.[19]

We are not required to perform an unassisted study of the record or review of the law relevant to a party's contentions on appeal. (*Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115.) A party's failure to perform its duty to provide argument, citations to the record, and legal authority in support of a contention may be treated as a waiver of the issue. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, *supra*, 86 Cal.App.4th at p. 284; *Guthrey*, *supra*, at pp. 1115-1116.) We deem waived the Trust's challenge to the sufficiency of the evidence to support the findings that the foreclosure sale was void and the deed to the Trust was a fraudulent conveyance.

In any event, the record contains ample evidence to support the findings. Pierce's trust deed to Central Thrift, his alter ego, for the purported loan on which Central Thrift purportedly foreclosed was part of the chain of title to the Property when the alleged foreclosure trustee transferred the Property to the Trust. Thus, the deed to the Trust was part of the house of cards which the trial court found that Pierce constructed as part of an elaborate fraudulent scheme to cloud title to the Property and thereby remove it from the trial court's jurisdiction and ability to give effect to the judgment ultimately issued. The

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**19** In its reply brief, the Trust also argues that plaintiffs' opposition brief is not supported by the facts and incorporates by reference the section of Pierce's reply brief challenging the award of monetary damages, sanctions and attorney's fees.

trial court's finding that Pierce's trust deed to Central Thrift was fraudulent was enough to bring down his house of cards, including the deed to the Trust.

A finding of a fraudulent conveyance allows defrauded creditors such as the Bells to reach property in the hands of a transferee, in this case, the Trust. (Civ. Code, § 3439.07; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) Whether or not a creditor's claim arose before or after the transfer, a conveyance made by the debtor is fraudulent as to the creditor if the debtor intended to hinder or defraud the creditor by making the transfer or did not receive reasonably equivalent consideration for the transfer of title to the real property. (Civ. Code, § 3439.04; *Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 648; *Mejia*, *supra*, at p. 664.)

That Cannoles and, thus, the fictional Trust, were willing participants in Pierce's fraudulent scheme may be reasonably inferred from the evidence of Cannoles' prior connection to Bowman; that he learned about the foreclosure sale from Bowman; and that he was not an experienced real estate investor who would likely be interested in foreclosed properties, since he had never bought property before the sale. The trial court believed Kuewa's testimony that Cannoles and Pierce were at the coffee shop meeting together before the other participants arrived. Cannoles' responses about the sale documents and his willing execution of documents Pierce presented for his signature, with no indication that he had reviewed them, show Cannoles' dependence on Pierce and willingness to do whatever Pierce asked.

Other actions by Cannoles were inconsistent with an arm's length real property transaction. Cannoles did not open an escrow for the sale. He did not see the sale documents or his deed of trust to Central Thrift until Pierce presented them at the coffee shop meeting. He made no cash payment for the Property at the sale and testified that the Trust had no money to do so. The consideration he gave for the Property completed the circle back to Pierce: It was a promissory note to Central Thrift for the full sale price. Cannoles testified that he did not have a copy of the note and did not know its terms, but he believed that the Trust's first payment would be several thousand dollars, due in less than one month. The trial court did not find his testimony about the sale or the note to be

credible, and found that no sale was conducted and no note existed. We defer to the trial court's credibility determination. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at pp. 630-631.)

Moreover, if the deed of trust to Central Thrift and the deed to the Trust were not voided as fraudulent, Pierce would succeed in his fraudulent scheme to cloud title to the Property and interfere with the trial court's ability to render judgment in this case. It is a rule of equity that a debtor cannot place his property beyond the reach of his creditors so long as he retains the right to receive and use it. (*Estate of Camm* (1946) 76 Cal.App.2d 104, 112.) Pierce's fraudulent scheme, including the purported foreclosure sale and deed to the Trust, was designed to do just that—place the Property beyond the reach of the Bells but provide a mechanism for him to retain control and use of it.

As a related matter, the Trust contends that the trial court did not have jurisdiction over it as a defendant in this case. It is not necessary, however, for the trial court to have jurisdiction over the Trust in order to void the deed to the Trust as fraudulent. (Civ. Code, §§ 3439.04, 3439.07.) Indeed, the judgment does not impose liability on the Trust but merely refers to the deed to the Trust. Our decision would not be affected by resolution of the Trust's issues related to jurisdiction, and we decline to address them.

**2. Attorney's Fees**

We agree that Western Properties Trust should not be named as a party responsible for payment of the Bells' attorney's fees. In view of the trial court's express finding that Pierce directed the Trust and its actions with regard to the Property, and the court's implied finding that the Trust was a "fiction," any liability that the so-called Trust should have for attorney's fees is, in actuality, to be attributed to Pierce. Accordingly, we vacate the attorney's fees order as to Western Properties Trust.

**3. Amendment of the Complaint**

The Trust contends that the trial court erred in permitting amendment of the complaint at the end of the trial. We disagree. It is well established that a trial court has

the discretion to permit amendment of the pleadings during the course of trial. (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.) In considering whether to do so, "trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment." (*Ibid*.) A trial court has jurisdiction "to render judgment on a cause of action contained in an amendment [to the complaint] filed after the close of trial." (*Genger v. Albers* (1949) 90 Cal.App.2d 52, 55; see also *State Medical Education Bd. v. Roberson* (1970) 6 Cal.App.3d 493, 502.) "Where the variance is not misleading, the court may find the facts according to the evidence or may order an immediate amendment. [Citations.] Great liberality is allowed with respect to amendments at the trial if the defendant is not prejudiced thereby and the ends of justice will be subserved provided the issues to be decided are not wholly changed. [Citation.]" (*Genger*, *supra*, at p. 55.)

The variance in the amended complaint herein was not misleading. (*Genger v. Albers*, *supra*, 90 Cal.App.2d at p. 55.) The amendments pertaining to the Trust arose from fraudulent actions that Pierce and Cannoles, as trustor of the Trust, took during the course of the trial and were not discovered by the Bells until the trial was almost at an end. Pierce and Cannoles were effectively represented by Bowman during all of the trial proceedings pertaining to the fraudulent foreclosure sale. Testimony was taken from them, Kuewa and Ramsey and documents were admitted into evidence concerning all aspects of the allegations added to the complaint to conform to proof. Permitting the amendment after the trial closed was not prejudicial to Cannoles or the fictional Trust. (*City of Stanton v. Cox*, *supra*, 207 Cal.App.3d at p. 1563.)

The identification of Western Properties Trust as a Doe defendant in the amended complaint is consistent with the trial court's authority under section 187 to use "all the means necessary to carry [the court's jurisdiction] into effect." Identification of the Trust as an entity "acting at the direction of Pierce" was an accurate representation indicating that any action purportedly taken by the Trust was in actuality an action by Pierce. It also differentiated the Trust from other added Doe defendants, such as Central Thrift, which

were identified as "alter-ego[s] of Pierce." We conclude that the trial court did not abuse its discretion in allowing the Bells to amend their complaint to identify the Trust and to allege a cause of action based upon facts already shown at trial. (§§ 187, 473, subd. (a)(1); *City of Stanton v. Cox, supra,* 207 Cal.App.3d at p. 1563.)

**F. *Modification of Judgment***

We have discretion to exercise our authority to modify a trial court's judgment when to do so would eliminate the need for further litigation, and the record shows the parties' rights can be determined fully on appeal. (§§ 43, 906; *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, 625.) In such circumstances, in order to spare the parties further delay and expense, we may modify the judgment and affirm it, rather than remand for further proceedings. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170.)

Consistent with the views expressed herein, we exercise our authority to modify the judgment as to ancillary damages. Also, loan provisions in the judgment refer to dates after the close of escrow. We find no escrow requirement in the judgment, and, accordingly, we add such a requirement.

## DISPOSITION

The judgment is modified as follows:

Page 5: The full paragraph beginning on line 3 shall be modified to read in full as follows:

"The Initial Down Payment shall be reduced by the amount of $3,000.00, as the total of the $1,500.00 initial deposit made by the Bells, as well as $500.00 per month that was paid from January 2005 through March of 2005 which was to count toward the purchase pursuant to the Option To Buy Addendum signed by Vanessa E. Bell and Sam Pierce on December 30, 2004. Thus, the Initial Down Payment is hereby reduced to $2,000.00."

Page 5: Immediately following the above paragraph, add the following paragraphs: "Michael J. Bell, Vanessa E. Bell and Sam Pierce shall open an escrow for the Property conveyance no later than five (5) calendar days after the date this judgment becomes effective, utilizing an escrow company selected by Michael J. Bell and Vanessa E. Bell. The escrow closing date shall be no later than 60 days after the opening date of the escrow, provided that the Bells may extend the escrow up to an additional 30 days by giving prior written notice to the escrow officer and to Pierce. The escrow instructions shall include the terms for conveyance of the Property set forth in this judgment and the terms of the Real Estate Purchase Agreement and Receipt for Deposit signed by the parties on March 1, 2005 consistent with this judgment, augmented as the Bells deem appropriate with usual and customary terms of an escrow for purchase of a single family residence which are consistent with this judgment. Michael J. Bell, Vanessa E. Bell and Sam Pierce shall execute the escrow instructions no later than seven calendar days after the date the escrow is opened by deposit of the Initial Down Payment.

"All payments, deeds and other documents which a party is required by this judgment to provide shall be submitted into escrow prior to the closing date for distribution by the escrow officer at the close of escrow.

"Nothing herein shall preclude the Bells from exercising their right to prepay the loan to Pierce specified herein at any time of their choosing, including at the close of the afore-mentioned escrow, with no prepayment penalty."

As modified, the judgment is affirmed. The order awarding attorney's fees is vacated as to Western Properties Trust, and is affirmed in all other respects. The Bells are awarded their costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.